



NORTHERN PLAINS RESOURCE COUNCIL
(ON JUDICIAL REMAND)

188 IBLA 19

Decided June 14, 2016



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Interior Board of Land Appeals
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NORTHERN PLAINS RESOURCE COUNCIL
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IBLA 2011-156-1

Decided June 14, 2016

Remand to the Board for further adjudication of *Bull Mountain Land Alliance*, IBLA 2011-156, in accordance with the March 31, 2016, Opinion and Order of the U.S. District Court for the District of Montana in *Northern Plains Resource Council, Inc. v. United States Bureau of Land Management*, 2016 U.S. Dist. LEXIS 43947.

Finding of No Significant Impact and Decision Record reaffirmed.

1. Environmental Quality: Environmental Statements;
National Environmental Policy Act of 1969:
Environmental Statements

NEPA requires consideration of appropriate alternatives to a proposed action, including a no action alternative. Such alternatives are reasonable if they would accomplish the intended purpose of the proposed action, are technically and economically feasible, and will avoid or minimize adverse effects. A “rule of reason” governs the selection of alternatives, both as to which alternatives an agency must discuss and the extent to which it must discuss them.

2. Administrative Procedure: Burden of Proof;
Environmental Quality: Environmental Statements;
National Environmental Policy Act of 1969:
Environmental Statements

The burden is on the challenging party to present objective proof demonstrating error in BLM’s selection and assessment of alternatives to a proposed action. Mere disagreement or a difference of opinion does not suffice to establish error in BLM’s alternatives analysis.

3. Environmental Quality: Environmental Statements;
National Environmental Policy Act of 1969:
Environmental Statements

When, in an environmental assessment, BLM discusses in detail the environmental impacts of a decision to offer for competitive lease certain tracts of Federal coal, it need not discuss every possible alternative. Setting forth the implications of both the proposed action and a no action alternative, which are at either end of the spectrum of leasing the coal or not leasing the coal, will suffice.

APPEARANCES: Jack R. Tuholske, Esq., Missoula, Montana, and DarAnne R. Dunning, Esq., Helena, Montana, for Northern Plains Resource Council; Daniel C. Garfinkel, Esq., Robert L. Burns, Esq., Samuel W. Braver, Esq., Eric Spada, Esq., Pittsburgh, Pennsylvania, for Signal Peak Energy, LLC; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE ROBERTS

In a March 31, 2016, Opinion and Order styled *Northern Plains Resource Council, Inc. v. United States Bureau of Land Management [Northern Plains v. BLM]*,¹ the U.S. District Court for the District of Montana remanded a single issue in this matter to the Board for adjudication. The Court's Opinion and Order resulted from an appeal by Northern Plains Resource Council (NPRC), of the Board's October 22, 2012, Order in *Northern Plains Resource Council*, IBLA 2011-156. In our Order, we affirmed an April 15, 2011, Finding of No Significant Impact/Decision Record (FONSI/DR) of the Deputy State Director, Montana State Office, Bureau of Land Management (BLM), approving the Bull Mountains Mine No. 1 (Mine) Federal Coal Lease-By-Application (LBA) Project. The LBA was submitted by Signal Peak Energy, LLC (SPE),² the owner and operator of the Mine, pursuant to the Mineral Leasing Act (MLA)³ and implementing regulations.⁴

In its FONSI/DR, BLM decided to offer for competitive coal lease five tracts of land, comprising 2,679.76 acres, situated adjacent to and east of the existing Mine.

¹ 2016 U.S. Dist. LEXIS 43947 (D. Mont. Mar. 31, 2016), at *43.

² Formerly, Bull Mountain Coal Properties, Inc.

³ 30 U.S.C. §§ 181-287 (2012).

⁴ 43 C.F.R. Subpart 3425.

The FONSI/DR was based upon an April 2011 Environmental Assessment (EA),⁵ prepared pursuant to the National Environmental Policy Act of 1969 (NEPA)⁶ and its implementing regulations.⁷ For purposes of environmental review, mining the coal was considered to be the logical consequence of the proposed action, *i.e.*, leasing the coal, and BLM assumed that SPE would be the successful bidder for the lease and would develop the coal in conjunction with its Mine.⁸

The Court faulted the Board for not addressing NPRC's argument that BLM "erred by not considering an adequate range of alternatives."⁹ The Court remanded the case to this "Board for further consideration of [NPRC's] proposed alternatives."¹⁰ Because we are persuaded that BLM analyzed a reasonable range of alternatives, we hold that BLM fulfilled its NEPA obligation, and accordingly reaffirm BLM's April 2011 FONSI/DR.

BACKGROUND

The factual background of this matter was set forth by both the Board¹¹ and the Court,¹² and will be repeated in this opinion only to the extent relevant to our consideration of whether BLM considered an "adequate range of alternatives."¹³ As stated by the Court, "[a]lternatives that do not advance the purpose of the project are not considered reasonable or appropriate."¹⁴

In this case, the purpose of the Project is to enable SPE to develop the coal reserves contained within the existing Bull Mountains Life-of-Mine (LOM) area, which includes the five coal lease tracts subject to SPE's LBA. Those tracts are "within the mining sequence for developing large blocks of [S]tate and private coal reserves."¹⁵ Approval of the Project will allow SPE to "extend the existing permitted

⁵ DOI-BLM-MT-C010-2009-0010-EA.

⁶ 42 U.S.C. §§ 4321-4370h (2012).

⁷ 40 C.F.R. Parts 1500-1508 (Council on Environmental Quality) and 43 C.F.R. Part 46 (Department).

⁸ See FONSI/DR at unpaginated (unp.) 5; EA at 2-20.

⁹ *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *41-*43; see 42 U.S.C. § 4332(2)(E) (2012).

¹⁰ *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *43.

¹¹ Order, *Bull Mountain Land Alliance*, IBLA 2011-156 (Oct. 22, 2012).

¹² *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *2-*11.

¹³ *Id.* at *40.

¹⁴ *Id.* at *41.

¹⁵ EA at 1-3.

mine plan to the full extent of the LOM area.”¹⁶ SPE seeks to mine an additional estimated 71.6 million tons of coal on State and private lands, which lie interspersed among the five tracts of land that will be leased by BLM. BLM notes that this non-Federal coal would otherwise be by-passed were it not mined in conjunction with the Federal coal, since it is not economically minable except as part of the proposed Mine extension.¹⁷ Leasing the minerals will allow SPE to implement its mining plan for the entire LOM area, which is 14,777 acres.¹⁸

The Mine is currently being operated under a State surface coal mining permit, along with a mining and reclamation plan, and an air quality permit, approved by the Montana Department of Environmental Quality (MDEQ).¹⁹ MDEQ regulates surface coal mining operations on Federal and non-Federal lands in Montana under the Surface Mining Control and Reclamation Act of 1977 (SMCRA),²⁰ pursuant to an approved State program subject to oversight by the Office of Surface Mining Reclamation and Enforcement (OSM).

SPE expects the mining of the estimated 61.4 million tons of minable Federal coal in the leased lands to extend current operations an additional 5 years, based on a rate of extraction of 12 million tons per year.²¹ Coal would be extracted from the Mammoth coal seam, which ranges from 8 to 11 feet thick, using existing continuous production main and longwall panel mining methods.²² The coal would be accessed from the existing Mine and, once extracted, stored and processed in existing surface facilities, resulting in no additional surface disturbance or facilities. After processing, the coal would be transported by rail to present and future domestic and international customers. Mining would take place in accordance with a modification of the existing mine plan, utilizing the same production and transportation facilities and infrastructure as the existing Mine, and the resulting coal would continue, for the foreseeable future, to be sold for the generation of electricity in coal-fired power plants.²³

BLM prepared the EA to consider the potential environmental impacts of the proposed action of leasing the five tracts of Federal coal to SPE, and a no action alternative. Following public scoping that began in November 2008, BLM completed

¹⁶ *Id.*

¹⁷ *See id.* at 1-5, 2-20, 4-1, 4-5.

¹⁸ *Id.* at 1-5.

¹⁹ *Id.* at 1-6 through 1-7.

²⁰ 30 U.S.C. §§ 1201-1328 (2012).

²¹ EA at 1-5, 2-2.

²² *See* EA at 1-6, 2-1, 2-20; FONSI/DR at unp. 5.

²³ *See* FONSI/DR at unp. 1.

a draft EA on March 16, 2010, offering it for public comment for a 30-day period and holding a public hearing on April 13, 2010.²⁴ OSM and MDEQ participated in drafting the EA, as cooperating agencies. After considering the comments, BLM revised the draft EA, issuing it in final form on April 15, 2011.²⁵

Based upon the EA, BLM issued its FONSI/DR approving SPE's LBA. BLM provided for offering approximately 2,700 acres of Federal coal adjacent to the Mine for competitive coal leasing, and for leasing the coal to the highest qualified bidder at the lease sale, provided that the highest bid met or exceeded the fair market value of the coal and all of the other lease requirements were met.²⁶

NPRC, together with the Bull Mountain Land Alliance (BMLA), filed a timely appeal from the FONSI/DR, which the Board docketed as IBLA 2011-156. By order dated June 1, 2011, we granted a motion by SPE to intervene in the appeal. SPE is a party to the present remand from the Court.

NPRC and BMLA filed a petition to stay the effect of the FONSI/DR, which we denied by order dated September 30, 2011. The competitive lease sale occurred on February 28, 2012, following which a competitive lease²⁷ was issued to SPE, the high bidder, effective June 1, 2012.

NPRC filed suit in U.S. District Court on May 14, 2014. The Court, in its March 2016 Opinion and Order, granted BLM's and SPE's motions for summary judgment, and denied NPRC's motion for summary judgment. The Court ruled that BLM had complied with NEPA by preparing an EA instead of an environmental impact statement,²⁸ and by adequately considering the likely environmental impacts of the proposed competitive leasing and associated mining and related activities.²⁹ However, the Court held that the Board should have addressed NPRC's argument that BLM did not consider an "adequate range of alternatives."³⁰ Absent such adjudication, the Court concluded that "the Board had acted arbitrarily and capriciously by not addressing [NPRC's] alternatives argument."³¹ The Court

²⁴ See 75 Fed. Reg. 15456 (Mar. 29, 2010) (availability of draft EA); 73 Fed. Reg. 44279 (July 30, 2008) (notice of LBA filing).

²⁵ See FONSI/DR at unp. 8-9.

²⁶ FONSI/DR at unp. 5.

²⁷ MTM-97988.

²⁸ *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *13-*26.

²⁹ *Id.* at *26-*37.

³⁰ *Id.* at *40.

³¹ *Id.*

remanded the case to the Board “for further consideration of [NPRC’s] proposed alternatives.”³² The Court stated that it “express[ed] no opinion as to whether the EA addressed an adequate range of alternatives.”³³

We here only address the single issue remanded to the Board, considering the original briefing provided by NPRC and the other parties in IBLA 2011-156.

DISCUSSION

[1] Under section 102(2)(E) of NEPA,³⁴ an agency is required to consider “appropriate alternatives” to the proposed action as well as their environmental consequences.³⁵ Such alternatives are those that are reasonable alternatives to the proposed action, will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact, by virtue of avoiding or minimizing the adverse effects of the proposal.³⁶ A range of alternatives will be reviewed under a “rule of reason” standard that “requires an agency to set forth only those alternatives necessary to permit a reasoned choice.”³⁷ This standard ensures that the BLM decisionmaker “has before him and takes into proper account all possible approaches to a particular project.”³⁸ BLM should also consider a no action alternative when preparing an EA.³⁹

[2] The burden is on the challenging party to present objective proof demonstrating error in BLM’s selection and assessment of alternatives. Mere disagreement or a difference of opinion does not suffice to establish error in BLM’s alternatives analysis.⁴⁰

³² *Id.* at *43.

³³ *Id.* at *44.

³⁴ 42 U.S.C. § 4332(2)(E) (2012).

³⁵ See 40 C.F.R. §§ 1501.2(c) and 1508.9(b); see also *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1245 (9th Cir. 2005); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466 (10th Cir. 1984); *Bales Ranch, Inc.*, 151 IBLA 353, 363 (2000).

³⁶ See *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d at 1466-67; *Bales Ranch, Inc.*, 151 IBLA at 363.

³⁷ *Headwaters Inc. v. BLM*, 914 F.2d at 1180 (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).

³⁸ *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); see, e.g., *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006).

³⁹ See *Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-41 (2003).

⁴⁰ *Oregon Chapter, Sierra Club*, 176 IBLA 336, 352 (2009).

As the Court noted, the intended purpose of a proposed action defines the scope of the alternatives analysis, since the range of alternatives is dictated by “the stated goal of a project,” and thus only those alternatives that accomplish such purpose need be considered.⁴¹ An agency is not required to consider a range of alternatives that extends beyond those reasonably related to the purpose of the project and alternatives that do not accomplish the purposes of the project may be rejected.⁴² Here, BLM’s purpose for the proposed action was to determine whether to authorize, under suitable terms and conditions, the leasing and recovery of Federal coal underlying the Project area. In its EA, BLM stated:

The purpose of [the proposed action] . . . is for the BLM to respond to SPE’s Lease by Application to acquire the coal reserves in five coal lease tracts in order to implement the Life of Mine Plan for the Bull Mountains Mine No. 1. . . . The BLM, charged with administration of the mineral estate under the[] private and [F]ederal lands, is required, by law, to consider leasing [F]ederally-owned minerals for economic recovery. The BLM *considers leasing the coal reserves and prescribes mitigation or stipulations for the protection of non-mineral resources*.^[43]

NPRC does not challenge BLM’s stated purpose as unreasonably narrow or designed to unjustly eliminate reasonable alternatives, or for any other reason.

A. *The Remand for Consideration of NPRC’s “Additional Alternatives”*

In its Opinion and Order, the Court noted that the FONSI/DR was a “leasing decision.”⁴⁴ It stated:

Here, *BLM did not approve a mining operation*, but rather approved an application to lease the coal. [SPE] needed to separately apply to the [OSM] to actually mine the [F]ederal coal. [SPE] previously submitted the application [to mine], and the OSM[] issued an EA and a FONSI analyzing that application in January 2015.^[45]

⁴¹ *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 812 (9th Cir. 1999); *see, e.g., Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998); *Roseburg Resources Company*, 186 IBLA at 336; *Escalante Wilderness Project*, 163 IBLA 235, 240, 241 (2004).

⁴² *Oregon Chapter, Sierra Club*, 176 IBLA at 352; *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1983).

⁴³ EA at 1-5 (emphasis added).

⁴⁴ *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *25.

⁴⁵ *Id.* (emphasis added; citation omitted).

The proposed action under consideration here was the leasing, under suitable terms and conditions, of Federal coal by competitive means. Thus, appropriate alternatives to the proposed action relate to whether BLM properly approved the LBA, not the timing, location, and manner of mining operations which will follow. Such terms and conditions were finally approved by the Department in 2015, following separate NEPA review and recommendation by OSM.⁴⁶

The Court specifically instructed the Board to address whether BLM should have considered NPRC's "additional alternatives."⁴⁷ Those alternatives, as stated by NPRC in its Statement of Reasons (SOR) and quoted by the Court, are as follows:

[L]ease stipulations that the winning bid-holder and lessee be required to mitigate subsidence damage, lease stipulations that any degradation to water quality be restored to the same water quality as existed pre-mining, requirement of bonding measures to protect landowners and the public, making the lease seam-specific, and examination of alternative mining techniques to long-wall mining such as the room and pillar mining (in which the pillars keep the overburden from collapsing, eliminating or lessening subsidence issues).^[48]

We begin our review of these "additional alternatives" by making clear that they actually constitute measures designed to mitigate the adverse effects of subsidence caused by underground mining.⁴⁹ NPRC identifies "mitigated action alternatives" as "stipulations" designed to mitigate the impacts of SPE's proposed mining activities. Those "mitigated action alternatives" would alter the terms and conditions under which the proposed action will occur, in order to lessen its adverse environmental consequences, and are more accurately referred to as mitigation measures under NEPA.⁵⁰ The "mitigation action alternatives" proposed by NPRC are designed to avoid or minimize the adverse environmental consequences that may later result from BLM's initial decision to lease the Federal coal.⁵¹ BLM is required, as a

⁴⁶ OSM's January 2015 Bull Mountains Mine No. 1 Federal Mining Plan Modification EA, its Jan. 27, 2015, FONSI, and the Assistant Secretary's Feb. 24, 2015, Mining Plan Approval are available at <http://www.wrcc.osmre.gov/initiatives/bullMountainsMine.shtm> (last visited June 8, 2016); see 30 C.F.R. §§ 740.4 and 746.13.

⁴⁷ *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *10.

⁴⁸ SOR at 26; *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *10.

⁴⁹ SOR at 26; see *WildEarth Guardians*, 182 IBLA 100, 106-07, 109 (2012).

⁵⁰ See 40 C.F.R. § 1502.14 (distinguishing "reasonable alternatives" (subsection (a)) from "appropriate mitigation measures" (subsection (f))).

⁵¹ See *WildEarth Guardians*, 182 IBLA at 109.

procedural matter under NEPA, to consider adopting those mitigation measures that will reduce significant impacts to insignificance, addressing whether and to what extent they are likely to be effective in doing so.⁵²

Regardless of how NPRC's "additional alternatives" are properly categorized, most of them, or some version of them, have already been imposed on operations at the Mine, and will continue in effect when the Mine is expanded in accordance with the proposed action.⁵³ As SPE observed in its Answer, many of the stipulations and mitigation measures suggested by SPE "are already incorporated into the proposed action," or BLM has "explained why they were not feasible for this lease."⁵⁴ We recognize that these stipulations and mitigation measures are not "alternatives" under NEPA, but we address them in order to respond to the District Court's specific order that we do so.

In its EA, BLM considered impacts to the resources of concern to NPRC, such as water quality and landowner protection, through a comparison of the no action alternative with the proposed action. In their SOR, NPRC and BMLA faulted BLM for describing "only two alternatives—the requisite no action alternative and the proposed action BLM endorses."⁵⁵ NPRC stated that the "no action alternative in Section 2.2 consists of only one paragraph, and focuses almost entirely on the fact that if this coal is not leased, additional private and state coal reserves would also not be capable of being mined."⁵⁶ In NPRC's view, BLM's Table 2.4-1, was inadequate.⁵⁷ That Table provides a side-by-side and detailed comparison of the environmental impacts to critical resources under the no action alternative and the proposed action. NPRC asserted that this Table "focuses more on the similarities between the two alternatives rather than taking a critical look at the differences (and thus the true environmental impacts)."⁵⁸

In its Answer, BLM rightly pointed out that NPRC and BMLA "entirely ignore[d] the analysis contained in Chapter 4 of the EA."⁵⁹ In their Reply, NPRC and BMLA made the conclusory statement that the comparison of the no action alternative and the proposed action in Table 2.4-1 does not "take a critical look at the differences

⁵² See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989); *Klamath Siskiyou Wildlands Center*, 157 IBLA 332, 338 (2002).

⁵³ EA at 2-1.

⁵⁴ SPE's Answer at 26, 27.

⁵⁵ SOR at 25.

⁵⁶ *Id.* at 25-26.

⁵⁷ EA at 2-24 through 2-26; see SOR at 26.

⁵⁸ *Id.*

⁵⁹ BLM's Answer at 15.

(and thus the true environmental impacts) between mining and no mining on these 2,700 acres.”⁶⁰ NPRC again failed to acknowledge the analysis presented in Chapter 4 of the EA.

In Chapter 4 of the EA, BLM addressed the environmental impacts to a wide range of resources, including the resources of concern to NPRC, both under the proposed action and the no action alternative, and described the measures that would be imposed under the proposed action to mitigate those impacts, where feasible. The EA provides a cogent comparison of the no action alternative and the proposed action for each resource, including Geology, Mineral Resources, and Paleontology; Air Quality; Water Resources; Soils; Vegetation; Wildlife; Threatened, Endangered, and Special Status Species; Ownership and Use of Land; Cultural Resources; Visual Resources; Noise; Transportation Facilities; Hazardous and Solid Waste; Socioeconomics; and Environmental Justice.⁶¹ NPRC does not show that BLM’s analysis of impacts to any of the resources considered is deficient.

1. Stipulation to “Mitigate Subsidence Damage”

In its SOR, NPRC states that BLM failed to consider an alternative that would include lease stipulations requiring SPE to “mitigate subsidence damage.”⁶² The mitigation of subsidence damage is a very broad concept, and in many respects is the general subject of the entirety of Chapter 4 of the EA. The primary impact of concern to BLM, as with NPRC, is subsidence from longwall mining; as the EA demonstrates, subsidence can and does affect myriad resources.

BLM first analyzed the environmental impacts to the “topography and physiography” of the Project area caused by SPE’s proposed mining of the Federal coal.⁶³ Of course, under the no action alternative, BLM would not approve the LBA and mining would not occur in the five leased tracts; consequently, additional mining resulting from the LBA would not occur.”⁶⁴ In sum, there would be no impacts on topography and physiography to consider if the LBA is not approved.

In considering these impacts, BLM focuses on subsidence. BLM states that “[i]n general, subsidence would be uniform over broad areas,” but “could occur on steep slopes and long rock outcrops where localized slope failure and rock toppling

⁶⁰ SPE’s Reply at 13.

⁶¹ *Id.* at 4-13 through 4-56.

⁶² SOR at 26; *Northern Plains v. BLM*, 2016 U.S. Dist. LEXIS 43947, at *10.

⁶³ EA at 4-1.

⁶⁴ *Id.*

may occur.”⁶⁵ BLM explains that the proposed action involves mining the coal in portions of 10 longwall panels that would be mined in the LOM area over a 7-year period, a scenario that includes mining the private and state coal reserves south and east of the lease area. BLM indicates that “[t]he current layout of the Life of Mine Plan has been established within the existing geologic environment to reduce overall environmental impact, [and] protect environmental resources where possible.”⁶⁶ BLM states that “[n]o longwall mining would occur in areas of less than 200 feet of overburden cover to protect surface resources from potential subsidence damage.”⁶⁷ BLM analyzes the geology of the lease area, grouping the impacts of subsidence to the overburden from longwall mining into three zones: “the fragmented zone, the fractured zone, and the deformation zone.”⁶⁸ BLM then considers “[t]he surface effects of subsidence [that] depend on characteristics of the overburden as well as depth of mining below the surface, height of the coal seam removed, mine layout, and mine direction.”⁶⁹ In Figure 4.1-1, BLM depicts areas of steep slopes in the lease area where effects of subsidence “would be likely to occur.”⁷⁰ BLM expects “[t]he overall effects from mining-related subsidence [to] be minor over the short term (one to six months after mining) and negligible over the long term,” with possible “local variations in the effects.”⁷¹

BLM then devotes Section 4.2.1.1 to mitigation measures for addressing surface impacts related to subsidence.⁷² BLM states that “[p]otential ground disturbance from subsidence over mined areas is anticipated, but the exact nature and extent of the disturbance is unknown.”⁷³ A key feature of SPE’s mine plan is the requirement to monitor the surface over the longwall panel as the mine operation progresses. “The information from this monitoring is being used to identify actual subsidence effects and to refine the subsidence model for the real-world conditions of the mine area.”⁷⁴ BLM describes in detail the Subsidence Monitoring Plan that is included in SPE’s approved mine permit.⁷⁵ That Plan provides for subsidence monitoring that would be tied to SPE’s longwall mining operations. A baseline survey would be conducted three months prior to longwall mining of each panel, and

⁶⁵ *Id.*

⁶⁶ *Id.* at 4-5.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4-6.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 4-5 through 4-9.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

subsidence measurements would be made according to longwall mining advancement and every 1,000 feet of longwall advancement or once a month, whichever interval is shorter.⁷⁶ Further, “[m]ine subsidence would be monitored and mitigation measures would be implemented should subsidence occur in the area of roads or other structures.”⁷⁷

2. *Stipulation to Restore Water Quality*

Given NPRC’s specific concern with water quality, we note that BLM devotes 30 pages to the impacts of SPE’s mining operation on water resources, including impacts to groundwater;⁷⁸ springs, ponds, wetlands, and wells;⁷⁹ and surface water.⁸⁰

BLM catalogs the various stipulations and mitigation measures for addressing impacts to surface drainage and groundwater caused by SPE’s mining operation.⁸¹ SPE is required by its MDEQ-approved surface coal mining permit to rehabilitate water resources, as appropriate, and repair damage to existing structures and infrastructure occasioned by mining-related subsidence.⁸² Under that permit, SPE must furnish a performance bond to secure compliance with all lease terms and conditions in connection with the Mine operation.⁸³ In its FONSI/DR, BLM states that “[m]itigating measures to reduce potential short-term impacts to geology, water resources, air quality, soils, vegetation, wildlife, sensitive species, ownership and use of land, and cultural resources were incorporated in the design of the Proposed Action.”⁸⁴

BLM details the mitigation measures that are included in SPE’s approved permit—details that reflect SPE’s “commit[ment] to mitigating hydrologic impacts caused by mining through the measures approved in the permit, or by alternative measures to be developed in consultation with the MDEQ.”⁸⁵ BLM states:

⁷⁶ *Id.* at 4-9.

⁷⁷ FONSI/DR at 2-3; *see* EA at 4-13 through 4-44.

⁷⁸ EA at 4-13 through 4-25.

⁷⁹ *Id.* at 4-25 through 4-41.

⁸⁰ *Id.* at 4-41 through 4-44.

⁸¹ *Id.*, Table 2.1-1, at 2-16.

⁸² *See* FONSI/DR at 6-7.

⁸³ *See id.* at 9.

⁸⁴ FONSI/DR at 2.

⁸⁵ *Id.* at 4-44.

Depending on the resource, impact, and mitigation alternatives available, SPE will rehabilitate water resources as appropriate. This might include drilling new wells, piping water from wells or springs to specific locations, development of new springs, repair of stream channels, repair of ponds, or establishment of other water management structures, such as guzzlers (water harvest tanks). To implement these measures, SPE has developed a strategy for mitigation of any short or long-term hydrologic or wetland impacts that occur due to mine development, operating, or reclamation. The mitigation plan will follow a multi-step process that has already been initiated for phases of progression of mining operation.^[86]

BLM lists the various measures in place for purposes of mitigating impacts caused by SPE's mining operation, in accordance with whether the impacts occur during the pre-mining phase, operation phase, or the post-mining phase.⁸⁷

3. *Measures to Protect Landowners and the Public*

As an additional alternative, NPRC argues that BLM should have considered "bonding requirements to protect landowners and the public."⁸⁸ NPRC provides no explanation of what bonding requirements it would impose in addition to those described in the EA. BLM addressed impacts to "Ownership and Use of Land" under the proposed action and the no action alternative. Of course, if BLM denied the LBA there would be no long-term effects on ownership and use of land.⁸⁹ Under the proposed action, BLM considered impacts related to subsidence over longwall-mined areas, such as "localized slope instability, rock toppling, and alteration of topography," which "may slightly alter patterns of use in the short term during subsidence, but would not have a long-term effect on use of the land."⁹⁰

BLM noted that "SPE would be required to conduct a pre-mine survey to determine the status of all structures above the mine area, monitor subsidence during and after mining, and immediately repair damage to the structures."⁹¹ BLM stated that "SPE would be required to post a reclamation bond to insure availability of funds to repair damages to identified structures."⁹² As mitigation measures, "SPE would

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ SOR at 16.

⁸⁹ EA at 4-3.

⁹⁰ *Id.* at 4-47.

⁹¹ *Id.* at 4-48.

⁹² *Id.*

repair damage to existing buildings and structures resulting from subsidence”; repair damage to existing infrastructure over mined areas, such as roads, fences, communications facilities, and utilities”; “submit a protection plan to MDEQ . . . prior to mining . . . [w]here there would be known or reasonably anticipated damage to infrastructure or communications facilities”; and “publish the mining schedule at least six months prior to mining under an individual’s land.”⁹³ In its EA, BLM includes a Table that lists impacts to buildings, structures, roads, fences, and utilities, with a description of the permit stipulations and mitigation measures included in SPE’s approved permit for mitigating damage to those resources.⁹⁴ Those stipulations will apply to SPE’s proposed expanded operation.⁹⁵

4. “*Making the Lease Seam-Specific*”

NPRC mentions as an alternative “making the lease seam-specific.”⁹⁶ The FONSI/DR states that “[t]he LBA would provide a logical extension of SPE’s Mammoth coal seam workings within the current Bull Mountain Mine No. 1.”⁹⁷ The EA states that the purpose and need of the proposed action is to mine “an estimated 61.4 million tons of in-place coal reserves in the Mammoth coal seam.”⁹⁸ The proposed action analyzed by BLM has been defined in a way that is “seam-specific.”

5. “*Alternative Mining Techniques*”

NPRC states that BLM should have examined “alternative mining techniques to long-wall mining such as room and pillar mining.”⁹⁹ However, BLM made clear in its EA that SPE’s existing Mine plan involves the recovery of coal by continuous development and longwall panels, and that the proposed action is to extend the “existing permitted mine plan to the full extent of the LOM area.”¹⁰⁰ In its FONSI/DR, BLM noted that longwall mining “is the most efficient mining method currently utilized in the underground coal mining industry,” and “results in the highest coal recovery with the lowest costs, while providing a safe working place for mine personnel.”¹⁰¹ BLM emphasized that in the absence of approval of the Project,

⁹³ *Id.*

⁹⁴ EA, Table 2.1-1, at 2-18.

⁹⁵ *Id.* at 1.1.

⁹⁶ SOR at 26.

⁹⁷ FONSI/DR at unp. 1.

⁹⁸ EA at 1-5; *see id.* at 2-1.

⁹⁹ SOR at 26.

¹⁰⁰ EA at 1-3.

¹⁰¹ EA at 2-2; *see also id.* at 2-16, 2-18, 4-44, 4-48; SPE Answer (IBLA 2011-156)

mining would cease upon reaching the Federal coal and “[S]tate and private coal reserves . . . would not be accessible by the longwall plan that has been proposed.”¹⁰² And without the Project, the additional “accessible coal would not be economically mineable by longwall methods.”¹⁰³ In short, the proposal to forgo longwall mining would not achieve the purpose and need of the proposed action.

B. BLM Appropriately Considered only the Proposed Action and the No Action Alternative

[3] Having reviewed BLM’s consideration of the additional alternatives mentioned by NPRC, as directed by the District Court, we will address NPRC’s argument that BLM erred in considering only the proposed action of leasing and the alternative of no leasing. In this case, it was sufficient for BLM to consider the alternatives at either end of the spectrum, from leasing the Federal coal, under the proposed action, or not leasing any of the Federal coal, under the no action alternative. Subsumed thereunder were the different configurations of leasing under the proposed action, including temporally or spatially altering the leasing of the Federal coal.

As the Board stated in *In Re Blackeye Again Timber Sale*: “[I]t was not necessary for BLM to discuss the myriad of alternatives which could be devised, each resulting in an incremental change in the overall impact of the sale. It is sufficient that BLM set forth the many implications of either its proposed action or the no action alternative, which are at either end of the spectrum.”¹⁰⁴ And in *Native Ecosystems Council v. U.S. Forest Service*, approving consideration only of the proposed action and the no action alternative, the Ninth Circuit stated that NEPA and its implementing regulations do “not impose a numerical floor on alternatives to be considered.”¹⁰⁵ Rather, the concern is with “the substance of the alternatives[.]”¹⁰⁶ In *Arizona Zoological Society*, the Board observed: “[W]hen the EA discusses in detail the environmental impacts of the project, BLM need not address a plethora of possible alternatives; setting forth the implications of both its proposed action and the no action alternative, which form the ends of the spectrum, will suffice.”¹⁰⁷

at 26-27; BLM Answer (IBLA 2011-156) at 15-16.

¹⁰² EA at 1-3; see *id.* at Chapter 2.

¹⁰³ *Id.* at 1-3.

¹⁰⁴ 98 IBLA 108, 111 (1987); see also *Oregon Chapter, Sierra Club*, 176 IBLA at 352.

¹⁰⁵ 428 F.3d at 1246.

¹⁰⁶ *Id.*

¹⁰⁷ 167 IBLA 347, 359 (2006).

We conclude that BLM's consideration of only two alternatives was reasonable in light of the nature of the proposed action. BLM adequately considered the environmental ramifications of the possible approaches to the proposed leasing of Federal coal in the Project area. NPRC has presented no objective proof demonstrating error in BLM's assessment of these alternatives; their continuing disagreement does not suffice to establish error in BLM's alternatives analysis.¹⁰⁸

CONCLUSION

We, therefore, conclude on judicial remand that NPRC has not carried its burden to establish that BLM violated NEPA by failing to consider a reasonable range of alternatives to the proposed LBA Project, or that BLM's consideration of the no action alternative and proposed action was inadequate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,¹⁰⁹ BLM's April 2011 FONSI/DR is reaffirmed on judicial remand.

_____/s/
James F. Roberts
Deputy Chief Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge

¹⁰⁸ See *Oregon Chapter, Sierra Club*, 176 IBLA at 352.

¹⁰⁹ 43 C.F.R. § 4.1.